

# Calendar No. 1153

88TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
No. 1219

## CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION AND FOR OTHER PURPOSES

JULY 22, 1964.—Ordered to be printed

Mr. LONG of Missouri, from the Committee on the Judiciary, submitted  
the following

### REPORT

[To accompany S. 1666]

The Committee on the Judiciary, to which was referred the bill (S. 1666) to clarify and protect the right of the public to information, and for other purposes, having considered the same, reports favorably thereon, with amendments and recommends that the bill, as amended, do pass.

#### AMENDMENTS

*Amendment No. 1.* On page 1, line 7, and page 2, line 1, delete "in the public interest" and insert in lieu thereof "for the protection of the national security".

*Amendment No. 2.* On page 2, line 3, after the word "Register" insert "for the guidance of the public" and delete this same phrase on lines 15 and 16 of page 2.

*Amendment No. 3.* On page 2, lines 4 and 5, delete "including delegations by the agency of authority".

*Amendment No. 4.* On page 2, line 6, after "which," insert "the officers from whom," and on line 7, change the first "or" to a comma and, after "requests" insert "or obtain decisions", and on page 2, line 11, after "available" insert "or the places at which forms may be obtained".

*Amendment No. 5.* On page 2, line 13, after "rules" insert "of general applicability"; and on page 2, line 15, after "interpretations" insert "of general applicability".

*Amendment No. 6.* On page 2, line 17, delete "No" and insert in lieu thereof "Except to the extent that he has actual notice of the terms thereof, no".

*Amendment No. 7.* On page 2, lines 19 and 20, delete "organization, procedure, or other rule, statement, or interpretation thereof" and insert in lieu thereof "matter".

*Amendment No. 8.* On page 2, line 21, delete "so", and before the period insert "therein or in a publication incorporated by reference in the Federal Register".

*Amendment No. 9.* On page 2, beginning on line 23 with "(1)" delete all through "practices of any agency" on line 3 of page 3 and insert in lieu thereof—

(1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute.

*Amendment No. 10.* On page 3, line 6, before "orders" insert "all"; on page 3, line 7, after "cases" insert a comma; on page 3, line 7, delete "all" and insert in lieu thereof "those"; on page 3, line 8, after "interpretations" insert "which have been"; on page 3, line 8, after "agency" insert a comma; on page 3, line 8, delete "and affecting" and insert in lieu thereof "affect"; and on page 3, line 9, after "public," insert "and are not required to be published in the Federal Register,".

*Amendment No. 11.* On page 3, lines 11 and 12, delete "protect the public interest" and insert in lieu thereof "prevent a clearly unwarranted invasion of personal privacy,"; on page 3, lines 13 and 14, delete "an opinion, order, rule, statement, or interpretation" and insert in lieu thereof "an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation"; and on page 3, line 14, delete "such cases" and insert in lieu thereof "any case".

*Amendment No. 12.* On page 3, line 17, delete "adequate" and insert in lieu thereof "identifying", and on page 3, line 19, after "interpretation" add "of general applicability".

*Amendment No. 13.* On page 3, lines 19 and 20, delete "No final order, opinion, rule, statement or policy, or interpretation" and insert in lieu thereof—

No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted or promulgated after the effective date of this Act.

*Amendment No. 14.* On page 3, line 23, before the period insert "or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof".

*Amendment No. 15.* On page 4, line 1, before "its" insert "all".

*Amendment No. 16.* On page 4, beginning with "(1)" on line 3, delete all through "matters." on line 8, and insert in lieu thereof—

(1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure

of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

*Amendment No. 17.* On page 4, line 8, delete "The" and insert in lieu thereof "Upon complaint, the" and on page 4, lines 11 and 12, delete "upon complaint".

*Amendment No. 18.* On page 4, line 12, before "to order" insert "to enjoin the agency from further withholding, and".

*Amendment No. 19.* On page 4, line 18, add the following:

In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

*Amendment No. 20.* On page 4, line 20, delete "individual" and insert in lieu thereof "final", and on page 4, line 22, after "defense" insert "or foreign policy".

*Amendment No. 21.* On page 5, line 4, after "Congress." add the following subsections:

(f) As used in this section, "Private party" means any party other than an agency.

(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act.

#### PURPOSE OF AMENDMENTS

*Amendment No. 1.* The change of standard from "in the public interest" to "for the protection of the national security" is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase "public interest" in section 3(a) of the Administrative Procedure Act (and in S. 1666 as it was introduced) has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended—the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with this section's general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.

*Amendment No. 2.* It is the purpose of this change to have the phrase "for the guidance of the public" changed from a limitation in subsection (C) to a descriptive phrase applicable to all matter being published in the Federal Register.

*Amendment No. 3.* Under the existing Administrative Procedure Act, publication of delegations of authority are limited to "delegations by the agency of final authority." As very little *final* authority is normally delegated, there have been very few publications by agencies of delegations of authority. In an attempt to correct this unforeseen weakness in the Administrative Procedure Act, the drafters of S. 1666 deleted the word "final." However, as has been pointed out in agency comments to the committee, inclusion in the Federal Register of *all* delegations would result in the publication of a mass of unwarranted and unwanted material in the Register, assuming that agencies could and would comply with the requirement. Therefore, it is believed that it would be preferable to return to the original Senate version of the Administrative Procedure Act which did not contain a specific provision with respect to delegations. It is believed that proper descriptions of central and field organizations should include a description of those delegations of authority which are of interest to the public.

*Amendment No. 4.* This change, which complements that made by amendment No. 3, is designed to spell out in more detail that information which it is necessary for the public to have if it is to be able to deal efficiently with its Government. The public should have information as to the officers from whom it can obtain decisions.

*Amendment No. 5.* In section 2 of the Administrative Procedure Act, rules are defined in such a way that there is no distinction between those of particular applicability (such as rates) and those of general applicability. It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability or legion in number and have no place in the Federal Register and are presently excepted but by more cumbersome language.

*Amendment No. 6.* The provision regarding actual notice has been added to insure that a person having actual notice is equally bound by a rule as a person having notice by publication of the matter in the Federal Register. Certainly actual notice should be equally as effective as constructive notice.

In their comments upon the bill, many agencies gave examples of rules and procedures of which interested parties would have actual notice before there was any opportunity to have the rules or procedures published in the Federal Register and thus given constructive notice. For example, the Forest Service might close a forest, forbid fishing in a certain stream, or take many similar actions simply by posting signs of the rule in conspicuous places. Any person reading the sign would be more effectively informed than by relying upon knowledge of the content of the Federal Register.

*Amendment No. 7.* This is a purely grammatical change. It is believed that "matter" covers "organization, procedure, or other rule, statement, or interpretation thereof."

*Amendment No. 8.* There are many agencies whose activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc. It would seem advantageous to avoid the repetition of much of this material in the Federal Register when it can be incorporated by reference and is readily available to interested members of the public. This is one way in which the Federal Register can be kept down to a manageable size.

However, the items listed in this subsection must be in the Federal Register to be enforceable, either by actual incorporation or incorporation by reference. For purposes of this subsection, the latter phrase is defined to include: (1) uniformity of indexing, (2) clarity that incorporation by reference is intended, (3) precision in description of the substitute publication, (4) availability of the incorporated material to the public, and, most important, (5) that private interests are protected by completeness, accuracy, and ease in handling.

In connection with this change, it is not intended that only a few persons having a special working knowledge of an agency's activities be aware of the location and scope of these materials. Any member of the public must be able to familiarize himself with the enumerated items in this subsection by the use of the Federal Register, or the statutory standards mentioned above will not have been met.

*Amendment No. 9.* This change involves the redrafting of the three exceptions which are to govern subsection (b) in order that the exceptions in the various subsections have some uniformity of order.

Exception No. 1 in subsections (a), (b), and (c) relate to "national security" or "national defense or foreign policy"; and exception No. 2 relates to "internal management" or "internal personnel rules and practices." It will be noted that there is a broader exemption in subsections (a), i.e., "national security," than in subsection (b), i.e., "specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy." Also, it will be noted that subsections (b) and (c) have the additional exception, (3), covering matter which "is specifically exempted from disclosure by statute."

*Amendment No. 10.* These changes were made to define more precisely that matter which must be made available for public inspection and copying; it deletes the necessity to make available that material which is published in the Federal Register.

As the legislation is redrafted, there are three categories of agency material that are covered by the provisions of section (3b) providing for inspection and copying. These three are: (1) *all* final opinions, (2) *all* orders made in the adjudication of cases, (3) those rules, statements of policy, and interpretations which have been (a) adopted by the agency, (b) affect the public, and (c) are not required to be published in the Federal Register.

Thus (a), (b), and (c) apply only to the third category: rules, statements of policy, and interpretations.

The substantive reason for the amendment is to clarify whatever agency action is formally adopted by the agency, affects the public, and is not otherwise required to be published or made publicly available, is subject to section 3(b)'s provisions.

However, certain rules, interpretations, and statements of policy may not affect the public. For example, rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like may be adopted by the agency and not be required to be published in the Federal Register.

The term "affect the public" should be construed broadly to cover such materials as agency manuals issued to agency personnel which set forth procedures for determining entitlement to claims or benefits and the like.

*Amendment No. 11.* S. 1666 contains a provision to permit agencies to delete certain identifying details in opinions, orders, rules, state-

ments of policy, and interpretations. Agencies would be permitted to do so "to the extent required to protect the public's interest." It is believed that this is a proper standard for deletions of identifying details in the case of rules, statements of policy, or interpretations. However, such a standard is not readily applicable to or proper with respect to opinions and orders; it is believed that the correct standard here is "clearly unwarranted invasion of personal privacy." This change is interrelated to an additional exemption placed in subsection (c). (See amendment No. 16, *infra*.)

*Amendment No. 12.* This change substitutes the more specific term "identifying" for the vague term "adequate" as a modifier of "Index." This is, in fact, what the agencies' indexes should already do, i.e., identify the materials so that interested persons may easily find them. The criterion is that any competent practitioner who exercises diligence may familiarize himself with the materials through use of the index.

The words "of general applicability" were added for the same reasons they were added in amendment No. 5 (*supra*).

*Amendment No. 13.* This change makes the requirement of indexing prospective in application. It is necessary because some agencies have not kept any form of index, and will be overburdened with the task of indexing all their rules, statements, etc., retrospectively.

*Amendment No. 14.* As with amendment No. 6, actual notice is considered at least the equal of constructive notice.

*Amendment No. 15.* The addition of the word "all" before "its records" is to make clear that there is not intended to be any silent limitations attached to the records which are to be made available to the public.

*Amendment No. 16.* By this amendment, the three exceptions in subsection (c) are renumbered, rephrased, and supplemented by four additional exceptions.

Exceptions Nos. 1, 2, and 3 are the same as in subsection (b).

Exception No. 4 is for "trade secrets and other information obtained from the public and customarily privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses.

Exception No. 5 relates to "those parts of intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency

Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public.

Exception No. 6 relates to "clearly unwarranted invasion of personal privacy." In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are forced to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

Exception No. 7 deals with "investigatory files." As was the case with "trade secrets," it was originally thought that many agencies had statutory exemption for investigatory files. In fact, they do not; and there is a general consensus that such an exemption should be placed in this statute.

Exception No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.

*Amendment No. 17.* This amendment is purely grammatical.

*Amendment No. 18.* The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power.

*Amendment No. 19.* This is another addition which has been made to avoid any possible misunderstanding as to the courts' powers.

Further, this change would give precedence to actions for withholding. Without this, the remedy might be of little practical value.

*Amendment No. 20.* It was pointed out in the comments of the agencies that there might be considerable disadvantage of disclosure of preliminary votes by agency members. The committee agrees that this subsection should apply only to final votes.

*Amendment No. 21.* This remedies a discrepancy caused by use of the term "private party" in this act without being otherwise defined.

The 1-year period before this act goes into effect is to allow ample time for the agencies to conform their practices to the requirements of this act.

## PURPOSE OF BILL

In introducing the present bill, S. 1666, Senator Long quoted the words of Madison, who was chairman of the committee which drafted the first amendment:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

At no time in our history has this been truer than it is today, when the very vastness of our Government and its myriad of agencies makes it so difficult for the electorate to obtain that "popular information" of which Madison spoke. Only when one further considers that hundreds of departments, branches, and agencies are not directly responsible to the people, does one begin to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure. Many witnesses on S. 1666 testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," "required for good cause to be held confidential," and "properly and directly concerned."

It is the purpose of the present bill (S. 1666) to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.



## HISTORY OF LEGISLATION

After it became apparent that section 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.

The first of these proposals arose out of recommendations by the Hoover Commission Task Force, S. 2504, 84th Congress, introduced by Senator Wiley and S. 2541, 84th Congress, by Senator McCarthy. These were quickly followed by the Henning's bill, S. 2148, 85th, and by S. 4094, 85th, introduced by Senators Ervin and Butler, which was incorporated as a part of the proposed Code of Federal Administrative Procedure.

S. 4094 was reintroduced by Senator Hennings in the 86th Congress as S. 186. This was followed in the second session by a slightly revised version of the same bill, numbered S. 2780. Senators Ervin and Butler reintroduced S. 4094 which was now designated S. 1070, 86th Congress.

During the past Congress, Senator Carroll introduced S. 1567, co-sponsored by Senators Hart, Long, and Proxmire. Also introduced were the Ervin bill, S. 1887, its companion bill in the House, H.R. 9926, S. 1907 by Senator Proxmire, and S. 3410 introduced by Senators Dirksen and Carroll.

Although hearings were held on the Henning's bills, and considerable interest was aroused by all of the bills, no legislation resulted.

## INADEQUACY OF PRESENT LAW

The present section 3 of the Administrative Procedure Act, which would be replaced by S. 1666, is so brief that it can be profitably placed at this point in the report:

## PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES. Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public; but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) **PUBLIC RECORDS.**—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

In retrospect, the serious deficiencies in this section are glaringly obvious. They fall into four categories:

(1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest \* \* \*." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of interpretations of this phrase by Federal officials who wish to withhold information.

(2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it negates this command by adding the following limitation: "\* \* \* except those required for good cause to be held confidential \* \* \*."

(3) As to public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.

**PRESENT SECTION 3 OF ADMINISTRATIVE PROCEDURE ACT IS WITH-  
HOLDING STATUTE, NOT DISCLOSURE STATUTE**

It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Precisely the opposite has been true: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish disclosed.

Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no ingenuity for any official to think up a reason why a piece of information should not be withheld (1) as a matter of "public interest," (2) "for good cause found," or (3) that the person making the request is not "properly and directly concerned." And, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available

## WHAT S. 1666 WOULD DO

S. 1666 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld. It also provides a different set of standards in the three different subsections that deal with different types of information.

(2) It eliminates the test of *who* shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain right to privacy and a need for confidentiality in some aspects of Government operations and these are protected as specifically as possible; but outside these limited areas, all citizens have a right to know.

(3) The revised section 3 gives to any aggrieved citizen a remedy in court.

## AGENCY COMMENTS TO S. 1666

The Government agencies in their comments, both oral and written, which are on file with the committee, pointed to a number of types of Government files which were not exempted from disclosure but which, they believe, should be exempted and which are covered by the amendments proposed herein. A fairly detailed description of the bill, as amended, follows:

## DESCRIPTION OF SUBSECTION (a)

Subsection (a) deals entirely with publication of material in the Federal Register. This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of *too much* publication rather than *too little*.

There are, however, some changes. The vague and objectionable standard of "public interest" has been replaced by "national security," so that, under the revised subsection, the requirement for publication would have only two exceptions:

(1) any function of the United States requiring secrecy for the protection of the national security, or (2) any matter relating solely to the internal management of an agency \* \* \*.

There are a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.

There is also a provision, suggested by a number of agencies, for incorporation of other publications by reference in the Federal Register. This may be helpful in reducing the bulky present size of the Register.

The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added for several reasons. The old sanction was inadequate and unclear. The new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights. This gives added incentive to the agencies to publish the required material.

The following technical changes were also made with regard to subsection 3(a).

The phrase "\* \* \* but not rules addressed to and served upon named persons in accordance with law \* \* \*" was stricken because section 3(a) as amended only requires the publication of rules of general applicability.

"Rules of procedure" was added to remove an uncertainty. "Descriptions of forms available" was added to eliminate the need of publishing lengthy forms.

The new subsection 3(a)(2)(D) is an obvious change, added for the sake of completeness and clarity.

#### DESCRIPTION OF SUBSECTION (b)

Subsection (b) of S. 1666 [as subsec. (b) of sec. 3 of the Administrative Procedure Act] deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available.

There are three categories of exceptions. The first two are similar to those in subsection (a), and relate to matter which (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; or (2) relates solely to the internal personnel rules and practices of any agency. It will be noted that these exemptions are similar to those in subsection (a), but more tightly drawn.

Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.

With the above three exceptions, agencies must make available for public inspection and copying all final opinions (including concurring and dissenting opinions); all orders made in the adjudication of cases; and those rules, statements of policy, and interpretations which have been adopted by the agency, which affect the public, and which are not required to be published in the Federal Register.

There is a provision for the deletion of certain details in orders and opinions to prevent "a clearly unwarranted invasion of personal privacy." The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.

Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably

with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion, which the agency knows about, but which has been unavailable to the citizen simply because he had no way in which to discover it. However, considerations of time and expense cause this indexing requirement to be made prospective in application only.

Subsection (b) contains its own sanction that orders, opinions, rules, etc., which are not properly indexed and made available to the public may not be relied upon or cited as precedent by an agency.

There are also a number of technical changes in section 3(b):

The phrase “\* \* \* and copying \* \* \*” was added because it is frequently of little use to be able to inspect orders, rules, or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

The addition of “\* \* \* concurring and dissenting opinions \* \* \*” is added to insure that, if one or more agency members dissent or concur, the public as well as the parties should have access to these views and ideas.

The enumeration of orders, rules, etc., defines what materials are subject to section 3(b)'s requirements. The “unless” clause was added to provide the agencies with an alternative means of making these materials available through publication.

#### DESCRIPTION OF SUBSECTION (C)

Subsection (c) deals with “agency records” and would have almost the reverse result of present subsection (c) which deals with “public records.” Whereas the present subsection 3(c) of the Administrative Procedure Act has been construed to authorize widespread withholding of information, subsection 3(c) of S. 1666 requires its disclosure except in certain enumerated categories. The first three of these exceptions are the same as those in subsection (b).

The fourth exception is for “trade secrets and other information obtained from the public and customarily privileged or confidential”. This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses.

Exception No. 5 would exempt “intraagency or interagency memoranda or letters dealing solely with matters of law or policy.” This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out “in a goldfish bowl.” Govern-

ment officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and coworkers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The committee is of the opinion that the Government cannot operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature.

Exception No. 6 contains an exemption for "personnel files, medical files, and similar matter, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As with "trade secrets," before the receipt of agency comments and before the hearings, there was a belief that there was specific statutory authority in most cases to cover such things as personnel files, medical files, etc. However, it was discovered that such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., had great quantities of files, the confidentiality of which was maintained by rule but without statutory authority. There is a general consensus that these "personnel files" should not be opened to the public, and the committee again decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption will be held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."

Exception No. 7 is an exemption for "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." It was believed that most agencies had statutory authorization for withholding investigatory files. However, this proved to be incorrect, and even such agencies as the FBI did not possess such authority. The exemption covers investigatory files in general, but is limited in time of application.

Exception 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.

Subsection (c) contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel. The aggrieved person can bring an action in the district court where he resides, has his place of business, or in which the agency is situated. If the court finds that the information was wrongfully withheld, the court may require the agency to pay the cost and reasonable attorney's fees of the complainant. This power of the court to assess costs and reasonable attorney's fees is provided so that a private citizen or the press will be less prone to hesitate to use the remedy provided in section 3(c) because of financial inability or risk.

That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency and requiring it to sustain its action by a preponderance of the evidence puts the task of justifying and withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has

improperly withheld public information, when he will not know the reasons for it.

The court is authorized to give actions under this subsection precedence on the docket over other causes. Complaints of wrongful withholding shall be heard "at the earliest practicable date and expedited in every way."

#### DESCRIPTION OF SUBSECTION (d)

This subsection provides that a record be kept of all final votes by agency members in every agency proceeding and that this record of votes be available to the public.

Agency practice in this area varies. This change makes the publication of final votes of agency members a uniform practice and provides the public with a very important part of the agency's decisional process.

The only exemptions are to "protect the national defense or foreign policy" of the United States.

#### DESCRIPTION OF SUBSECTION (e)

The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exceptions in section 3. Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.

#### CONCLUSION

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.

A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended.

#### CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law (60 Stat. 237) made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

#### PUBLIC INFORMATION

SEC. 3. [Except to the extent there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—]

(a) **[RULES.—]** *PUBLICATION IN THE FEDERAL REGISTER.*—*Except to the extent that there is involved (1) any function of the United States requiring secrecy for the protection of the national security or (2) any matter relating solely to the internal management of an agency, every agency shall separately state and currently publish in the Federal Register for the guidance of the public [(1)] (A) descriptions of its central and field organization [including delegations by the agency of final authority] and the established places at which, the officers from whom, and methods whereby, the public may secure information, [or] make submittals or requests or obtain decisions; [(2)] (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available [as well as], rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; [and (3)] (C) substantive rules of general applicability adopted as authorized by law and statements of general policy or interpretations of general applicability formulated and adopted by the agency [for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law.] and (D) every amendment, revision, or repeal of the foregoing. Except to the extent that he has actual notice of the terms thereof, no person shall in any manner be required to resort to, or be bound or adversely affected by any [organization or procedure] matter required to be published in the Federal Register and not [so] published therein or in a publication incorporated by reference in the Federal Register.*

(b) **AGENCY OPINIONS [AND], ORDERS, AND RULES.**—*Except to the extent that matter (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute, every agency shall, [publish or] in accordance with published rules, make available [to] for public inspection and copying all final opinions [or] (including concurring and dissenting opinions) and all orders made in the adjudication of cases, [(except those required for good cause to be held confidential and not cited as precedents)] and [all] those rules, statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register, unless such opinions, orders, rules, statements, and interpretations are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any case the justification for the deletion must be fully explained in writing. Every agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to each final order, opinion, rule, statement of policy, and interpretation of general applicability. No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted or promulgated after the effective date of this Act may be relied upon, used, or cited as precedent*



by any agency against any private party unless it has been indexed and either made available or published as provided in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

(c) **[PUBLIC] AGENCY RECORDS.**—**[Save as otherwise required by statute, matters of official record]** Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, **[be made]** make all its records promptly available to any person **[to persons properly and directly concerned except information held confidential for good cause found.]** except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions. Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action by a preponderance of the evidence. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(d) **AGENCY PROCEEDINGS.**—Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and except to the extent required to protect the national defense or foreign policy such record shall be available for public inspection.

(e) **LIMITATION OF EXEMPTION.**—Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress.

(f) As used in this section "Private party" means any party other than an agency.

(g) **EFFECTIVE DATE.**—This amendment shall become effective one year following the date of the enactment of this Act.

C